IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 4, 2004 Session

IN RE ESTATE OF MAPLE FOSTER PARK

Appeal from the Chancery Court for Maury County
No. P-156-01 Jim T. Hamilton, Judge

No. M2003-00604-COA-R3-CV - Filed November 14, 2005

This appeal involves the validity of an 88-year-old widow's will that left her rather sizeable estate to her caregiver and her caregiver's husband. Several of the widow's relatives contested the will on the grounds of lack of testamentary capacity and undue influence. Following a bench trial, the Chancery Court for Maury County found that the widow lacked testamentary capacity and that her caregiver had procured the will by undue influence. Accordingly, the trial court invalidated the will and admitted the widow's earlier will to probate. The caregiver asserts on this appeal that the evidence does not support the trial court's conclusions that the widow lacked testamentary capacity when she executed the will or that the will was the product of the caregiver's undue influence. While we have determined that the evidence does not support the trial court's conclusion regarding the widow's testamentary capacity, we have determined that the evidence overwhelmingly supports its conclusion that the will was procured by the caregiver's undue influence.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

William R. Hefner and Donald J. Serkin, Brentwood, Tennessee, for the appellant, Linda F. Cathey.

J. Russell Parkes and Wesley Mack Bryant, Columbia, Tennessee, for the appellees, Lula Mae Crabtree, Dirck Dillehay, Katherine Dillehay, Kevin Dillehay, Kyle Dillehay, Jeanne Dillehay Dittmar, Lorena Harris, George L. Lovell, Polly Park Lovell, Edward Carmack Park, Lisa Dillehay Price, Barbara Park Schwarer, and Polly Duvall Wicaruis.

OPINION

I.

Maple Foster Park was born in 1913 in Columbia, Tennessee. In 1945, Ms. Park married her highschool sweetheart, F. E. "Gene" Park. The Parks remained in Columbia after they wed, settling on a twenty-one acre farm. Ms. Park worked for BellSouth, and Mr. Park worked for Hunter

Furniture Company. Eventually, Mr. Park became part owner of three furniture stores located in Pulaski, Lewisburg, and Columbia. The Parks had no children.

Over the years, the Parks accumulated a sizable estate worth over two million dollars. In 1993, they executed reciprocal wills drafted by T. Edward Lawwell, the Parks' attorney and long-time friend. In these wills, the Parks' entire estate would pass to the surviving spouse if one spouse predeceased the other. Because Ms. Park had no close relatives and had a close relationship with Mr. Park's family, the reciprocal wills contemplated devising the bulk of the estate to Mr. Park's family. In the event that the spouse failed to survive the testator, the estate would be divided six ways, with one-sixth devised to each of Mr. Park's three sisters and his niece and one-twelfth devised to each of Mr. Park's two nephews and remaining two nieces.

In November 1995, Ms. Park hired Linda Faye Cathey to help her on a part-time basis with errands and other household chores. In return for her services, Ms. Park bought groceries and clothes for Ms. Cathey and also paid some of Ms. Cathey's bills. Leon Cathey, Ms. Cathey's husband, began helping Ms. Park with yard work and odd jobs around her home.

Mr. Park died on February 8, 1996. One year later, on May 1, 1997, Ms. Park executed a new will prepared for her by Mr. Lawwell. While the new will was similar to the 1993 will, Ms. Park devised $20,000 and all of her clothing to the Catheys. Shortly after she executed this new will, Ms. Park asked Mr. Lawwell to draft a healthcare power of attorney empowering the Catheys to make emergency medical decisions for Ms. Park until a family member could be contacted.

Ms. Park executed a third will on February 2, 1998 that was substantially similar to her May 1, 1997 will. Since Ms. Park now required full-time assistance, Ms. Cathey took over as her primary caregiver at a salary of $500 per week. Ms. Cathey supervised four other persons providing care to Ms. Park. She also acquired authority from Ms. Park to write and sign checks on Ms. Park's accounts and to act as Ms. Park's agent in certain other business transactions.

In December 1998, Ms. Park asked Mr. Lawwell to draft a codicil to her will increasing her bequest to the Catheys from $20,000 to $25,000. However, before Mr. Lawwell could prepare that codicil, Ms. Park called again requesting that the codicil be changed to increase the cash gift to the Catheys to $100,000 and to include a truck, a car, and a tractor in the bequest. She told Mr. Lawwell that this bequest should be contingent on the Catheys continuing to provide her care and that the codicil should provide that William Massey at First Farmers and Merchants National Bank in Columbia would determine whether the Catheys continued to provide the required care to Ms. Park.

These requests piqued Mr. Lawwell's interest, and he arranged a personal meeting with Ms. Park to discuss her desires. As a result of the meeting, Mr. Lawwell became concerned about Ms. Park's deteriorating physical and mental condition, as well as her dependance on Ms. Cathey. He decided to inquire further into Ms. Park's relationship with Ms. Cathey and discovered that in addition to the $500 weekly salary, Ms. Park was also bestowing substantial monetary gifts on Ms. Cathey. Ms. Park also told Mr. Lawwell that Ms. Cathey had requested the changes in her will. Notwithstanding this information and his concerns about Ms. Park's condition, Mr. Lawwell drafted the requested codicil, and it was executed by Ms. Park on December 8, 1998.

By 1999, Ms. Cathey's compensation had increased from $500 per week to $25 per hour or $95,000 per year. Ms. Park's friends and family, and even her other caregivers, noticed that Ms. Cathey's control over Ms. Park was increasing and that Ms. Cathey was actively discouraging any contact between Ms. Park and her friends and family. Ms. Park's friends and family found it difficult to reach her by telephone or to visit her at her home. Ms. Cathey would often turn visitors away, telling them that Ms. Park did not feel like having company.

Ms. Cathey also told Ms. Park that her friends and family did not really care about her and that they were only interested in her money. Despite Ms. Cathey's comments, Ms. Park contacted members of her family surreptitiously, even though Ms. Park understood that Ms. Cathey did not approve of her doing so. She talked in a low voice on the telephone to prevent Ms. Cathey from overhearing her conversations. On more than one occasion, Ms. Park requested her other caregivers to erase her Caller ID to prevent Ms. Cathey from finding out about her telephone calls and to promise that they would not tell Ms. Cathey what she was doing. When Ms. Park invited family members to visit, she cautioned them to come when Ms. Cathey was not present.

Ms. Park was hospitalized several times during 1999. In January 1999, she was admitted to the hospital with acute confusion.[1] Her other health problems required several nursing home stays and an increase in her medication. Ms. Cathey took charge of administering Ms. Park's medications. During this period, Ms. Cathey wrote several "gift checks" totaling $9,000 to herself and her husband on Ms. Park's account. One of these checks – for $2,000 – was written while Ms. Park was hospitalized for congestive heart failure.

In December 1999, Ms. Park asked Mr. Lawwell to visit her at home to discuss yet another change in her will. When Mr. Lawwell visited Ms. Park on December 9, 1999, he immediately noticed a marked deterioration in her physical and mental health. When Ms. Park told him that she desired to bequeath the bulk of her estate to Ms. Cathey, Mr. Lawwell questioned her to make sure that she understood the extent of her estate and the significance of what she desired to do. Ms. Park told Mr. Lawwell that she could not remember how much she had already bequeathed to Ms. Cathey in her earlier wills. Dissatisfied with her responses, Mr. Lawwell told Ms. Park that he wanted to talk with her financial advisor before drafting revisions to her will. After Mr. Lawwell talked with Ms. Park's financial advisor, he attempted to contact Ms. Park several times. On each occasion, Ms. Cathey told Mr. Lawwell that Ms. Park was unavailable because she was resting. Ms. Park never returned Mr. Lawwell's telephone calls.

Ms. Park was again hospitalized on January 13, 2000, because of chronic renal insufficiency and angina. She had several psychological consults during this hospital stay. On January 14, 2000, Ms. Cathey contacted Tim Tisher, a lawyer practicing in Columbia, and asked him to prepare a new will for Ms. Park. Ms. Park was discharged from the hospital on January 15, 2000, and Mr. Tisher visited Ms. Park at her home three times over the next several days. Ms. Cathey was not present

[1] Ms. Park's hospital records stated, "it is readily apparent that she is confused and disoriented to person, place, and time."

during these conversations; however, Mr. Tisher noticed a "baby monitor" in Ms. Park's den which enabled Ms. Cathey to hear what was going on in the room.[2]

Following these meetings, Mr. Tisher drafted another will for Ms. Park. This will bequeathed all but $150,000[3] of her sizeable estate to Ms. Cathey. The gift to Ms. Cathey was no longer contingent on her continued care of Ms. Park, and Ms. Park named Ms. Cathey as her executrix. Ms. Park executed this will on January 25, 2000. Thereafter, Ms. Cathey continued to control Ms. Park's life and continued to write approximately $10,000 in "gift checks" to herself and her husband.

Ms. Park died on July 12, 2001. Five days later, Ms. Cathey filed a petition in the Chancery Court for Maury County to probate Ms. Park's January 25, 2000 will. On November 8, 2001, Ms. Park's sisters-in-law and other family members filed a complaint to contest the will on two grounds. The contestants asserted that Ms. Park lacked the testamentary capacity to make the January 25, 2000 will and that the will was the product of the undue influence of Ms. Cathey and her husband.

The trial court conducted a hearing on January 27, 2003. Thereafter, on February 10, 2003, the court filed a detailed order finding that Ms. Park lacked the testamentary capacity to make the January 25, 2000 will and that Ms. Cathey had unduly influenced Ms. Park with regard to the substance of the will. Accordingly, the trial court invalidated the January 25, 2000 will and admitted Ms. Park's February 2, 1998 will and December 8, 1998 codicil to probate. Ms. Cathey has appealed, asserting that the evidence preponderates against the trial court's findings that Ms. Park lacked testamentary capacity to execute the January 25, 2000 will and that she had used undue influence to procure the will. She also takes issue with the trial court's decision to permit Mr. Lawwell to testify regarding his dealings with Ms. Park.

II.
STANDARD OF REVIEW

The standards this court uses to review the results of bench trials is well-settled. With regard to a trial court's findings of fact, we will review the record de novo and will presume that the findings of fact are correct "unless the preponderance of the evidence is otherwise." We will also give great weight to a trial court's factual findings that rest on determinations of credibility. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). However, if the trial court has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence

[2] Mr. Tisher described how Ms. Cathey would appear in the room after Ms. Park spoke into the baby monitor without pressing any buttons.

[3] Ms. Park's will devised $50,000 to each of her three sisters-in-law.

lies without employing a presumption of correctness.[4] *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

Tenn. R. App. P. 13(d)'s presumption of correctness requires appellate courts to defer to a trial court's findings of fact. *Fell v. Rambo*, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). Because of the presumption, an appellate court is bound to leave a trial court's finding of fact undisturbed unless it determines that the aggregate weight of the evidence demonstrates that a finding of fact other than the one found by the trial court is more probably true. *Parks Props. v. Maury County*, 70 S.W.3d at 742. Thus, for the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000).

The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not to conclusions of law. Accordingly, appellate courts review a trial court's resolution of legal issues without a presumption of correctness and reach their own independent conclusions regarding these issues. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 367 (Tenn. 1998); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 71 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 48 S.W.3d 732, 734 (Tenn. Ct. App. 2000).

With regard to the admission or exclusion of evidence, appellate courts review the trial court's decisions using the "abuse of discretion" standard of review. *See Dockery v. Board of Prof'l Responsibility*, 937 S.W.2d 863, 866 (Tenn. 1996); *Miller v. Alman Constr. Co.*, 666 S.W.2d 466, 468 (Tenn. Ct. App. 1983). This standard implicitly recognizes the existence of a range of permissible alternatives. It is intended to be a review constraining concept implying less intense appellate review and, therefore, less likelihood of reversal. *See BIF v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *2 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed).

III.
THE TESTIMONY OF MR. LAWWELL

We turn first to Ms. Cathey's assertion that the trial court erred by failing to exclude the testimony of Mr. Lawwell. She asserts on this appeal that Mr. Lawwell's testimony should have been excluded because of a "conflict of interest" arising from the fact that he had prepared wills for one or more of the contestants. We have determined that Ms. Cathey cannot raise this issue on appeal because she did not object to Mr. Lawwell's testifying as a lay witness at trial.

Prior to the January 27, 2003 trial, Ms. Cathey filed a motion in limine to prevent Mr. Lawwell from testifying as an "expert witness." Specifically, she asserted that "[t]estimony given

[4]Reviewing findings of fact under Tenn. R. App. P. 13(d) requires an appellate court to weigh the evidence to determine in which party's favor the weight of the aggregated evidence falls. There is a "reasonable probability" that a proposition is true when there is more evidence in its favor than there is against it. Thus, the prevailing party is the one in whose favor the evidentiary scale tips, no matter how slightly. *Parks Props. v. Maury County*, 70 S.W.3d 735, 741 (Tenn. Ct. App. 2001); *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999).

by an expert witness who is a 'dear' friend of the offering party runs the risk of bias which could be prejudicial to a fair hearing." However, she also requested that the court "allow Mr. Lawwell to testify as a lay witness, but not as an expert witness."

When the court heard argument on the motion in limine on the day of the trial, Ms. Cathey's lawyer repeated that he was "not objecting to Mr. Lawwell's testimony as a lay witness." He explained that expert witnesses demanded "a higher standard of respect, and that's what we're objecting to in the motion in limine." The trial court denied the motion in limine after the contestants argued that Mr. Lawwell was not planning to give expert testimony. The contestants later called Mr. Lawwell as a witness but did not undertake to qualify him as an expert. His testimony consisted of his personal observations and actions with regard to preparing Ms. Park's wills. Nothing Mr. Lawwell testified to approached being an expert opinion, and Ms. Cathey did not object to any portion of his testimony.

Parties who desire to object to the admission of evidence must make their objection in a timely manner and must state the specific basis for their objection. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 702 (Tenn. Ct. App. 1999). Failing to make a timely, specific objection in the trial court prevents a litigant from challenging the introduction of the evidence for the first time on appeal. *Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 907 n.10 (Tenn. 1996); *Ehrlich v. Weber*, 114 Tenn. 711, 717-18, 88 S.W. 188, 189 (1905); *Wright v. United Servs. Auto. Ass'n*, 789 S.W.2d 911, 914 (Tenn. Ct. App. 1990).

The objection that Ms. Cathey is now making to Mr. Lawwell's testimony goes far beyond the objection she made in her motion in limine. She assured the trial court, both in her motion in limine and during the hearing on her motion, that her objection was limited to Mr. Lawwell's testimony as an expert witness. She also assured the trial court that she had no objection to Mr. Lawwell testifying as a lay witness. This is precisely what Mr. Lawwell did. He testified as a lay witness. Accordingly, Ms. Cathey cannot now assert that Mr. Lawwell's lay testimony should have been excluded based upon his bias, conflicts of interest, and improper motives. Accordingly, we decline to reverse the trial court's decision to permit Mr. Lawwell to testify.[5]

IV.
MS. PARK'S JANUARY 25, 2000 WILL

Ms. Cathey takes issue with the factual foundation of the trial court's conclusion that Ms. Park's January 25, 2000 will was invalid. First, she insists that the evidence does not support the court's conclusion that Ms. Park lacked testamentary capacity when she executed the January 25, 2000 will. Second, she insists that the contestants failed to make out a prima facie case of undue influence and that, even if they did, she presented clear and convincing evidence to rebut the presumption of undue influence arising from the contestants' evidence. We have determined that the contestants failed to prove that Ms. Park lacked testamentary capacity when she executed the

[5]Were we to address the substance of Ms. Cathey's objection to Mr. Lawwell's testimony, we would find that it was not well-taken.

January 25, 2000 will. However, we find that the evidence overwhelmingly supports the trial court's conclusion that the January 25, 2000 will was procured by Ms. Cathey's undue influence.

A.
The Burdens of Persuasion in Will Contest Proceedings

The purpose of a will contest is to have a will declared void either because the testator lacked the requisite testamentary capacity or because the will was procured by undue influence or fraud. *In re Estate of Eden*, 99 S.W.3d 82, 87 (Tenn. Ct. App. 1995); *Stacks v. Saunders*, 812 S.W.2d 587, 590-91 (Tenn. Ct. App. 1990). It is an in rem proceeding, *Lillard v. Tolliver*, 154 Tenn. 304, 323, 285 S.W. 576, 581-82 (1926), intended to test the external validity of the will. *Stacks v. Saunders*, 812 S.W.2d at 590; *Rogers v. Russell*, 733 S.W.2d 79, 84 (Tenn. Ct. App. 1987). The proceeding is now regulated entirely by statute.[6] *Jones v. Witherspoon*, 182 Tenn. 498, 503-04, 187 S.W.2d 788, 790 (1945); *Cude v. Culberson*, 30 Tenn. App. 628, 637, 209 S.W.2d 506, 511 (1947).

Only persons who will take a significant share[7] of the decedent's estate if the probated will is set aside may file a contest. *Jolley v. Henderson*, 154 S.W.3d 538, 543 (Tenn. Ct. App. 2004); *In re Estate of West*, 729 S.W.2d 676, 677-78 (Tenn. Ct. App. 1987). When a will contest is filed, the proponents of the will have the initial burden of proving that the will was executed in compliance with all legal formalities. *In re Estate of Elam*, 738 S.W.2d 169, 171 (Tenn. 1987). Proof of due execution makes out a prima facie case for the will's validity because it gives rise to the presumption that the testator was capable of making a will. *In re Estate of Maddox*, 60 S.W.3d 84, 88 (Tenn. Ct. App. 2001); *Curry v. Bridges*, 45 Tenn. App. 395, 407, 325 S.W.2d 87, 92 (1959); *Needham v. Doyle*, 39 Tenn. App. 597, 622, 286 S.W.2d 601, 612 (1955).

Once the proponent proves that the will was duly executed, the burden of persuasion shifts to the contestants to prove either that the testator lacked testamentary capacity to execute a valid will, *Russell v. Russell*, No. M2004-01767-COA-R3-CV, 2005 WL 2493480, at *2 (Tenn. Ct. App. October 7, 2005); *In re Estate of Maddox*, 84 S.W.3d at 88, or that the testator was unduly influenced in making his or her will. *In re Estate of Elam*, 738 S.W.2d at 171; *Green v. Higdon*, 870 S.W.2d 513, 520 (Tenn. Ct. App. 1993). If the contestant makes out a prima facie undue influence claim, the burden of persuasion shifts back to the will's proponent to prove by clear and convincing evidence that the challenged bequest was fair. *Childress v. Currie*, 74 S.W.3d 324, 328 (Tenn. 2002); *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995).

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[6] *See* Tenn. Code Ann. §§ 32-4-101 to -109 (2001 & Supp. 2005).

[7] A bequest of a substantial nature is required to give a contestant standing to challenge a will. *In re Estate of Spivey*, No. 01A01-9407-CH-00309, 1994 WL 697884, at *2 n.2 (Tenn. Ct. App. Dec. 14, 1994) (No Tenn. R. App. P. 11 application filed). Thus, for example, a bequest of one dollar is not sufficient to give a contestant standing to challenge a will. *Cowan v. Walker*, 117 Tenn. 135, 148, 96 S.W. 967, 970 (1906).

B.
Ms. Park's Testamentary Capacity

Ms. Cathey presented the testimony of Mr. Tisher and the persons who witnessed Ms. Park's January 25, 2000 will to prove that the will was duly executed. She now argues that the contestants failed to introduce sufficient evidence to rebut the presumption that arises from this evidence that Ms. Park was capable of making the January 25, 2000 will. We have determined that the contestants did not successfully rebut the presumption that Ms. Park possessed the requisite testamentary capacity arising from the undisputed evidence that her will was duly and properly executed.

1.

Persons who execute wills must, at the moment of execution, understand what they are doing and the consequences of their action. As the Tennessee Supreme Court has repeatedly noted, a person executing a will must know and understand (1) the nature and the effect of his or her act, (2) the property he or she possesses, and (3) the manner in which his or her property will be distributed under the will. *Childress v. Currie*, 74 S.W.3d at 328; *In re Estate of Elam*, 738 S.W.2d at 171-72. Executing a will requires less mental capacity than engaging in business transactions.[8] *Owen v. Summers*, 97 S.W.3d 114, 125 (Tenn. Ct. App. 2001); *Green v. Higdon*, 870 S.W.2d 513, 522 (Tenn. Ct. App. 1993). In common terms, a person has the capacity to execute a will if he or she knows and understands what he or she is doing. *In re Estate of Elam*, 738 S.W.2d at 171-72; *American Trust & Banking Co. v. Williams*, 32 Tenn. App. 592, 602, 225 S.W.2d 79, 83-84 (1948).

The inquiry into the testator's mental capacity must necessarily focus on the time when the testator executed the will. *In re Estate of Oakley*, 936 S.W.2d 259, 260 (Tenn. Ct. App. 1996); *Harper v. Watkins*, 670 S.W.2d 611, 628-29 (Tenn. Ct. App. 1983); *Melody v. Hamblin*, 21 Tenn. App. 687, 695, 115 S.W.2d 237, 242 (1937). However, evidence of the testator's mental and physical condition before and after executing the will, within reasonable limits, is admissible. *In re Estate of Elam*, 738 S.W.2d at 172; *In re Estate of Mayes*, 843 S.W.2d 418, 427 (Tenn. Ct. App. 1992). The limits on the period of time to be considered are within the trial court's discretion. *McCormack v. Riley*, 576 S.W.2d 358, 360 (Tenn. Ct. App. 1978). When called upon to set these limits, the courts should be mindful of the fact that in most cases, the mental capacity of the testator cannot be discerned simply by the appearance and conduct of the testator at the moment of executing the will. WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 29.58, at 535 (3d ed. 1961) [hereinafter PAGE ON WILLS]. Therefore, admission of the testator's "conduct, behavior, methods of thinking, and the like, extending over a long period of time, . . . [including] a very considerable period before and after the execution of the will, is admissible to show his capacity at the moment of making the will." PAGE ON WILLS § 29.58, at 535.

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[8] The factors to be considered in determining a person's capacity to contract are discussed in *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 297 (Tenn. Ct. App. 2001). Unlike business transactions, a person executing a will is not required to act with judgment and discretion. 1 JACK W. ROBINSON, SR. & JEFF MOBLEY, PRITCHARD ON THE LAW OF WILLS AND ADMINISTRATION OF ESTATES § 103, at 168 (5th ed. 1994) [hereinafter PRITCHARD ON WILLS].

2.

The trial court based its decision regarding Ms. Park's testamentary capacity on two pieces of evidence. The first was Mr. Lawwell's testimony that he did not believe that Ms. Park was capable of executing a will when he talked with her in December 1999 because of her failing health, her inability to recall the amount of her bequest to Ms. Cathey in the 1998 codicil, and her lack of understanding of the extent of her estate. The second piece of evidence was Mr. Tisher's admission that he never questioned Ms. Park as to the extent of her estate. The court also recognized that Ms. Park was heavily medicated and suffering serious health problems.

While Mr. Lawwell's testimony may very well prove that Ms. Park lacked the requisite testamentary capacity when he visited her in December 1999, it does not necessarily establish that Ms. Park lacked testamentary capacity on January 25, 2000 when she executed the will Mr. Tisher had prepared. To the contrary, Mr. Tisher and those who witnessed Ms. Park signing the will testified that she was alert, aware of her actions, and mentally capable of executing her will. The record does not contain sufficient evidence to rebut this testimony. Accordingly, the trial court's conclusion that Ms. Park lacked testamentary capacity when she signed her will on January 25, 2000 is not supported by the evidence.

C.
Ms. Cathey's Undue Influence

Ms. Cathey also asserts that the contestants failed to prove that she exerted undue influence over Ms. Park with regard to the January 25, 2000 will. She insists that the contestants failed to prove that she had a confidential relationship with Ms. Park or that sufficient suspicious circumstances existed to shift the burden of persuasion to her to demonstrate that the January 25, 2000 will was not procured by undue influence. She also asserts that she presented enough evidence of the independent legal advice Ms. Park received to dispel any inference of undue influence. We have determined that this record contains overwhelming evidence supporting the trial court's conclusion that Ms. Cathey exerted undue influence over Ms. Park in the preparation of the January 25, 2000 will.

1.

While undue influence may be proved either by direct or circumstantial evidence, direct evidence of undue influence is rarely available. Accordingly, in most cases, parties contesting a will on the ground that it was procured by undue influence must prove the existence of suspicious circumstances warranting the conclusion that the person allegedly influenced did not act freely and independently. *Kelley v. Johns*, 96 S.W.3d 189, 195 (Tenn. Ct. App. 2002); *Fell v. Rambo*, 36 S.W.3d at 847; *Mitchell v. Smith*, 779 S.W.2d 384, 388 (Tenn. Ct. App. 1989). Whether the suspicious circumstances relied upon by the contestants are sufficient to invalidate a will should be "decided by the application of sound principles and good sense." *Halle v. Summerfield*, 199 Tenn. 445, 454, 287 S.W.2d 57, 61 (1956); *In re Estate of Maddox*, 60 S.W.3d at 89.

The courts have not attempted to catalogue the types or number of suspicious circumstances needed to invalidate a will, but the scope of relevant evidence is quite broad. 1 PRITCHARD ON WILLS § 130, at 209-30. The suspicious circumstances most frequently relied upon to establish undue influence are: (1) the existence of a confidential relationship between the testator and the beneficiary, (2) the testator's physical or mental deterioration, and (3) the beneficiary's active involvement in procuring the will. *In re Estate of Elam*, 738 S.W.2d at 173; *Kelly v. Allen*, 558 S.W.2d 845, 848 (Tenn. 1977); *Estate of Hamilton v. Morris*, 67 S.W.3d 786, 792 (Tenn. Ct. App. 2001). Other circumstances include: (1) secrecy concerning the will's existence, (2) the unjust or unnatural nature of the will's terms, (3) discrepancies between the will and the testator's expressed intentions, and (4) fraud or duress directed toward the testator. *Kelley v. Johns*, 96 S.W.3d at 196; *Mitchell v. Smith*, 779 S.W.2d at 388.

Proof of the existence of a confidential relationship, by itself, will not be sufficient to invalidate a will. *Halle v. Summerfield*, 199 Tenn. at 455, 287 S.W.2d at 61; *In re Estate of Maddox*, 60 S.W.3d at 89. It is not the relationship that concerns the courts but rather the abuse of the relationship. *Robinson v. Robinson*, 517 S.W.2d 202, 206 (Tenn. Ct. App. 1974). Proof of the existence of a confidential relationship must be coupled with evidence of one or more other suspicious circumstances that give rise to a presumption of undue influence. *DeLapp v. Pratt*, 152 S.W.3d 530, 540 (Tenn. Ct. App. 2004). Accordingly, proof that a beneficiary had a confidential relationship, such as an unrestricted power of attorney, coupled with evidence of a transaction or gift to the beneficiary creates a presumption of undue influence. *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995); *Johnson v. Craycraft*, 914 S.W.2d 506, 510 (Tenn. Ct. App. 1995).

Once a contestant presents sufficient evidence to substantiate an undue influence claim, the burden of going forward shifts back to the will's proponent to prove by clear and convincing evidence that the challenged transaction or gift was fair. *Matlock v. Simpson*, 902 S.W.2d at 386; *DeLapp v. Pratt*, 152 S.W.3d at 540; *Hager v. Fitzgerald*, 934 S.W.2d 668, 671 (Tenn. Ct. App. 1996). Like the proof of suspicious circumstances, the scope of the evidence regarding the fairness of a transaction or gift is quite broad. Frequently, a will's proponents prove the fairness of a transaction by presenting evidence that the testator received independent advice. *Matlock v. Simpson*, 902 S.W.2d at 386; *Richmond v. Christian*, 555 S.W.2d 105, 107-08 (Tenn. 1977); *see also In re Estate of Elam*, 738 S.W.2d at 174 (the testator must receive "competent and independent advice, free from the influence of the donees"). The testator must have the opportunity to confer fully and privately with a person competent to inform him or her of the legal effect of the intended bequests. *See Turner v. Leathers*, 191 Tenn. 292, 297 (1950). However, proof of independent advice becomes necessary only when it would be difficult to show the fairness of the transaction or the competency of the testator without it. *In re Estate of Depriest*, 733 S.W.2d 74, 79 (Tenn. Ct. App. 1986).

2.

We turn first to Ms. Cathey's assertion that she did not have a confidential relationship with Ms. Park. For these purposes, a confidential relationship is any relationship that gives one person dominion or control over another. *Childress v. Currie*, 74 S.W.3d at 328; *Mitchell v. Smith*, 779 S.W.2d at 389. There is little doubt that a confidential relationship existed between Ms. Park and

Ms. Cathey by December 1999. Ms. Park was physically and mentally weakened. Ms. Cathey had taken over writing her checks, managing her finances, and handling her business affairs. Ms. Cathey had also assumed complete control over Ms. Park's life, including making the decisions regarding Ms. Park's visitors and the persons whom Ms. Park would be permitted to contact. Under these circumstances, Ms. Cathey was in a position to exert her will, both directly and indirectly,[9] over Ms. Park to the point where Ms. Park's decisions were not hers, but rather Ms. Cathey's.

3.

The record also contains abundant evidence of other suspicious circumstances that call into question the validity of the January 25, 2000 will. In fact, the evidence is so compelling that this case is among the clearest cases of undue influence that the members of this court have ever reviewed.

Ms. Park's health and mental acuity had been declining for years before she executed the January 25, 2000 will. Ms. Cathey had assumed control of Ms. Park's life and was using her position of trust to benefit herself and her husband. Ms. Cathey took an active role in procuring the January 25, 2000 will. The terms of this will were not only unjust and unnatural; they were also inconsistent with Ms. Park's previously stated intent.[10] After Ms. Park executed the January 25, 2000 will, Ms. Cathey kept the will a secret. Accordingly, the record contains abundant evidence supporting the trial court's finding of the suspicious circumstances surrounding the execution of the January 25, 2000 will.

4.

Realizing the strength of the contestants' case, Ms. Cathey argues that even if the record contains proof of suspicious circumstances surrounding the January 25, 2000 will, she presented sufficient evidence to rebut the presumption that the will was procured by undue influence. Ms. Cathey asserts that the fact that Mr. Tisher assisted Ms. Park with the preparation of her will provides evidence of independent advice that is sufficient to rebut any inference of undue influence. We find little merit in this argument for two reasons.

First, despite Ms. Cathey's insistence to the contrary, the evidence demonstrates that she was directly and actively involved in the preparation of the January 25, 2000 will. She selected Mr. Tisher. She contacted Mr. Tisher and facilitated his meetings with Ms. Park. Even though she was not physically present when Mr. Tisher talked with Ms. Park about her will, there is strong circumstantial evidence that Ms. Cathey was eavesdropping on the conversation using the baby monitor in Ms. Park's den.

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[9] Undue influence may be exerted directly or indirectly. *DeLapp v. Pratt*, 152 S.W.3d at 542; *Estate of Glasgow v. Whittum*, 106 S.W.3d 25, 31 (Tenn. Ct. App. 2002).

[10] Ms. Park had stated several times that she felt it was improper for a person to leave his or her entire estate to a caretaker.

Second, the independence and efficacy of Mr. Tisher's advice is undermined by his lack of familiarity with Ms. Park's holdings and her physical condition. Mr. Tisher admitted at trial that when he prepared the will he was unaware of the extent of Ms. Park's wealth. He also conceded that he was unaware of her recent hospitalizations, the psychological consults, the medications she was taking, or the role that Ms. Cathey played in Ms. Park's life. He also conceded that had he known this information, he would not have drafted the January 25, 2000 will until he had spoken with Ms. Park's physicians.

Once the burden of persuasion shifted to Ms. Cathey, she was required to present clear and convincing evidence to dispel the taint of undue influence. The evidence she submitted is far from convincing. Accordingly, the trial court properly held that Ms. Cathey failed to rebut the presumption supported overwhelmingly by the contestants' evidence that Ms. Park's January 25, 2000 will was the product of undue influence and, therefore, invalid.

V.

We affirm the portions of the February 10, 2003 and February 14, 2003 orders invaliding Ms. Park's January 25, 2000 will on the ground of undue influence and admitting Ms. Park's February 2, 1998 will and December 8, 1998 codicil to probate. We remand this case to the trial court for further proceedings consistent with this opinion. We also tax the costs of this appeal to Linda F. Cathey and her surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.